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NOTE AND COMMENT.

THE RENVOI THEORY REPUDIATED AS A TEST FOR DETERMINING THE NEGOTIABILITY OF A NOTE.—A recent case decided by the Supreme Court of Oklahoma (*Bell* v. *Riggs,* 127 Pac. 427) involving, among others, a question as to what law governs the negotiability of a note made in one State and payable in another,—though of little intrinsic value so far as that point is concerned,—is of some interest because the attorney for the holder of the note made a curious attempt to adapt the *renvoi* theory to his case. The term *renvoi* is used as a convenient descriptive term denoting that when the transaction involves a conflict of laws, the judge of the forum shall take into account not the particular law of the situs to which the *lex fori* refers the transaction, but the rules of private international law prevailing in that country, without regard to the particular law which may be deemed to control in the end. For example, suppose a citizen of New York, formerly a resident of that State, dies domiciled in Italy having personal property in New York, and suppose that a question arises in the New York courts with respect to the distribution of the property. By the law of the forum, the rule has been adopted that the law of the domicile of the deceased at the time of his death shall govern the distribution of his personal estate. Hence distribution must be determined by the Italian law. But what is meant by Italian law? Is the

New York judge to apply the Italian statute of distribution, or is he really directed by the *lex fori* to apply the Italian law as a whole, including its rules governing the conflict of laws? If the *lex fori* refers to the Italian law in this latter sense, it would be found that in the Italian system of private international law the *lex patriae* has supplanted the *lex domicilii*. If, therefore, the question came before an Italian court, the personal estate would be distributed according to the law of the country of which the deceased was a citizen at the time of death, namely, the law of New York. The view that under such circumstances the New York judge should apply the statute of distribution of his own State is generally known as the *renvoi* theory. See LORENZEN, RENVOI THEORY AND APPLICATION OF FOREIGN LAW, 10 COL. L. REV. 190, 327. Briefly, *renvoi* means that when a problem of conflict of laws is involved, and the law of the forum prescribes the application of a foreign law, the judge must take notice of the whole body of such foreign law including the rules governing the conflict of laws in such foreign country.

So far as continental nations are concerned the *renvoi* theory seems to have been adopted in France, Belgium, Spain and Portugal; but is rejected in Italy, Switzerland and Germany. The English courts seem to be undecided. *Collier* v. *Rivaz,* 2 Curt. Eccl. 855; *In re Johnson* [1903] 1 Ch. 821; and *In re Bowes,* 22 Times L. R. 711, apply the *renvoi* theory, while *Bremer* v. *Freeman,* 10 Moore, P. C. 306; and *Hamilton* v. *Dallas,* L. R. 1 Ch. D. 257, reject it. The theory has been approved in Canada; but by way of dictum only, *Ross* v. *Ross,* 25 Can. S. C. 307 The question has not hitherto been raised in the courts of this country, though the Court of Errors and Appeals of New Jersey, in one case may have had the theory in mind, *Harral* v. *Harral,* 39 N. J. Eq. 279.

So far as appears the principal case is the only recent American case in which the question of *renvoi* or anything like it has been raised. This was a suit by the maker to cancel a note and mortgage on the ground that though given for a loan, no money was in fact ever received by the borrower. The note and mortgage had been transferred by the payee to one who claimed to be a bona fide holder for value. The plaintiff contended that because of certain provisions therein, the note was not negotiable. The note was not negotiable by the law of Oklahoma where it was made. But the note was by its terms payable in Wichita, Kansas, and therefore under the general rule the question of its negotiability would be determined by the law of Kansas. *Brabston* v .*Gibson,* 9 How. 263, 13 L. Ed. 131; *Holmes* v. *Bank of Fort Gaines,* 120 Ala. 493, 24 South. 959; *Stevens* v. *Gregg,* 89 Ky. 461, 12 S. W. 775; *Strawberry Point Bank* v. *Lee,* 117 Mich. 122, 75 N. W. 444; *Freeman's Bank* v. *Ruckman,* 16 Grat. 126; and see *Chandler* v. *Kennedy,* 8 S. D. 56, 65 N. W. 439. By the law of Kansas the note was negotiable. The contract of the parties as contained in the mortgage provided, however, that both the note and the mortgage should be governed by the law of Oklahoma. A stipulation of this nature is valid and will be enforced, unless to give it effect would contravene some rule of public policy of the state of the forum. *McAllister* v. *Smith,* 17 Ill. 328, 65 Am. Dec. 651; *Union Cent. Life Ins. Co.* v. *Pollard,* 94 Va. 146, 26 S. E. 421, 30 L. R. A. 271, 64 Am. St.

Rep. 715; *Greer* v. *Poole,* 5 Q. B. D. 272. The defendant, apparently with the *renvoi* theory in his mind, contended that the stipulation that the contract should be governed by the law of Oklahoma really meant that it should be governed by the law of Oklahoma as a whole, and that it was, therefore, governed by the law to which the Oklahoma rules as to conflict of laws would refer it; namely, the law of Kansas. The Supreme Court of Oklahoma, however, disposes of this contention by saying that the argument, if plausible, is certainly not more than plausible. R. W. C.

WHO ARE PARTIES TO A SUIT BESIDES THOSE SHOWN OF RECORD?—While the doctrine has long been recognized that others besides parties to a suit (as shown by the record) and their privies, are estopped by a former judgment, nevertheless it is surprising to note the diversity of judicial opinions upon the subject, especially where a person was acting as an attorney of one of the parties as shown by the record to the suit. In the recent case of *McMillan* v. *Barber Asphalt Paving Co.* (Wis. 1912) 138 N. W. 94, a taxpayer sued the city of Fond du Lac to enjoin the execution by it of a contract for street paving. The attorney of the contracting company which was to lay the paving appeared and participated in the defense in connection with the regular counsel of the city. The attorney made no charges to the city for his services, but he was under a general retainer from the contractor, and the latter paid all his expenses. It did not appear who had the actual control of the litigation. The court held that a judgment rendered adjudicating the invalidity of the contract was binding on the contractor, though it was not made a party to the suit.

The basic fundamental rule is that a matter once adjudicated by a court of competent jurisdiction, may be invoked as an estoppel in any collateral suit, when the same parties or their privies allege anything contradictory to it, but that it is not admissible in evidence as affecting the rights of any person not a party or privy thereto. *Hale* v. *Finch,* 104 U. S. 261; *In re Lightner's Estate,* 187 Pa. St. 237; *Kelley* v. *Chapman,* 13 Ill. 530; *Goss* v. *Wallace,* 140 Ind. 541; *Perkins* v. *Pitts,* 11 Mass. 125; *Stewart* v. *Wheeling R. R.,* 53 Oh. St .151, 29 L. R. A. 438; *Haffley* v. *Maier,* 13 Cal. 13. Upon the above rule, questions have arisen as to who are parties, and here it is that courts, seizing on slight facts, depart from harmony. "Parties," according to the definition formulated by a leading writer, are those "who have a right to control the proceedings, to make defenses, to adduce and cross-examine the witnesses, and to appeal from the decision if any appeal lies." 1 GREENLEAF, EVID., § 535. Accordingly, many courts have extended the fundamental rule above set out, to conclude persons who, while not parties as shown by the record, have nevertheless actually participated in the trial and controlled its management. *State ex rel. National Subway Co.* v. *St. Louis,* 145 Mo. 551; *Lightcap* v. *Bradley,* 186 Ill. 510; *Parsons* v. *Urie,* 104 Md. 238; *Burns* v. *Gavin,* 118 Ind. 320; *Pew* v. *Johnson,* 35 Mont. 173; *Weld* v. *Clarke,* 209 Mass. 9; *Lamberton* v. *Dinsmore,* 75 N. H. 574; *Hudson* v. *Wright,* 164 Ala. 298.

As before indicated, it is dangerous, if not impossible, to lay down any general rule, for very slight changes in the facts of a case may make a